

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHANIKA CHA-COLE MOORE,

Defendant-Appellant.

UNPUBLISHED

March 1, 2005

No. 252304

Wayne Circuit Court

LC No. 03-003312-2

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FELICIA MARIE DYER,

Defendant-Appellant.

No. 252305

Wayne Circuit Court

LC No. 03-003312-1

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendants Chanika Moore and Felicia Dyer were jointly tried before a single jury. Defendant Moore was convicted of assault with intent to commit murder, MCL 750.83, and sentenced to a prison term of fifteen to thirty years. Defendant Dyer was convicted of assault with intent to commit murder, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant Dyer was sentenced to a prison term of fifteen to thirty years for the assault conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant Moore appeals as of right in Docket No. 252304, and defendant Dyer appeals as of right in Docket No. 252305. We affirm.

I. Basic Facts

Defendants' convictions arise from allegations that, in the early morning of February 8, 2003, defendant Dyer shot the complainant while riding in a car driven by defendant Moore. At approximately 2:30 a.m., the complainant was walking from a friend's house to get into David Carter's car when defendants' car pulled up. According to the complainant, defendant Moore

got out of the car, made a comment, and then defendant Dyer “grabbed [the complainant’s] jacket” and asked if it was leather. A fight ensued, and eventually some men intervened.

The complainant got into the passenger side of Carter’s car, and Carter quickly drove away. Defendants got into defendant Moore’s car, with defendant Moore driving and defendant Dyer in the passenger seat, and followed Carter’s vehicle. Carter estimated that the chase lasted five minutes. According to the complainant, defendant Moore attempted to run Carter’s car “off the road,” and “kept trying to swerve [them] off the road.” She also saw defendant Dyer “hanging out” of the window. Carter testified that defendants’ car was so close that it almost hit his car and, at one point, he had to swerve onto a sidewalk to avoid being hit. Carter saw defendant Dyer leaning out of the window, and saw her arm extended. Both Carter and the complainant heard a gunshot, and the complainant felt a “nick.”

The complainant identified both defendants at a lineup. At trial, the complainant testified that she was “positive” that defendant Moore was the driver of the pursuing vehicle, and that defendant Dyer was seated on the passenger side. At trial, Carter identified defendant Moore as the driver and defendant Dyer as the woman he saw leaning out of the passenger side window. Although Carter saw defendant Dyer’s arm extended and heard a shot, he did not see a gun. At the lineup, Carter identified defendant Moore as the driver, but originally identified someone other than defendant Dyer as the shooter. Shortly after the lineup was concluded, Carter indicated to a police officer that he chose the wrong person. He then identified defendant Dyer from a photo array of the original lineup. Other witnesses, including the complainant’s brother, identified defendants as being involved in a brawl with the complainant, and also indicated that defendants left after Carter and the complainant.

II. Defendant Moore’s Issues in Docket No. 252304

A. Admission of Evidence

Defendant Moore argues that the trial court abused its discretion by allowing irrelevant and prejudicial testimony that the police confiscated ammunition and an empty gun holster from codefendant’s Dyer’s residence approximately five weeks before this offense. We disagree.

This Court reviews the trial court’s decision to admit evidence for an abuse of discretion. *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

Generally, all relevant evidence is admissible at trial. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. MRE 401. Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point. *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). But even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. “Unfair prejudice” does not mean “damaging.” Any relevant evidence will be damaging to some extent. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995), modified

450 Mich 1212 (1995). Rather, unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002).

Defendant Moore has not demonstrated that the trial court's evidentiary ruling was an abuse of discretion. At trial, the prosecution theorized that codefendant Dyer shot the complainant, and that defendant Moore aided and abetted her by pursuing Carter's car while codefendant Dyer leaned out the window to shoot at the complainant. Given the prosecution's theories, the evidence that the police confiscated ammunition and an empty gun holster from codefendant's Dyer's residence was relevant to show that codefendant Dyer had access to a handgun and, thus, was probative of defendants' participation in the crime and codefendant Dyer's identity as the shooter. There was a legitimate, material, and contested ground on which to offer the evidence. MRE 401. Furthermore, as noted by the trial court, defendant Moore has not demonstrated that the probative value of the evidence was substantially outweighed by its prejudicial effect. MRE 403. Accordingly, the trial court did not abuse its discretion in allowing the evidence.

Moreover, to the extent that the evidence was not admissible, a preserved nonconstitutional error is not grounds for reversal unless it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The defendant bears the burden of demonstrating that such an error resulted in a miscarriage of justice. *Id.* Given the other evidence against defendant Moore, particularly the complainant's and Carter's identifications of her, it is highly improbable that the outcome would have been different had the trial court precluded the challenged evidence. Therefore, defendant Moore cannot affirmatively establish that it is more probable than not that the alleged error was outcome determinative. Reversal is not warranted on this basis.

B. Motion for Mistrial

Defendant Moore also argues that the trial court abused its discretion by denying her motion for a mistrial, after the prosecutor commented during opening statement that the police executed a search warrant at codefendant Dyer's residence and confiscated ammunition and an empty gun holster. We agree with the trial court that defendant Moore failed to state a basis for a mistrial.

This Court reviews a trial court's ruling on a motion for a mistrial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id.* (citation omitted).

Defendant Moore is not entitled to relief, principally because she cannot establish prejudice or impairment of her right to a fair trial. As discussed previously, the trial court did not abuse its discretion by allowing the evidence that ammunition and a gun holster were confiscated from codefendant Dyer's residence. Opening statement is the appropriate time to state a fact that will be proven at trial, *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991), and these facts were presented by the prosecutor through the testimony of a police officer. Additionally, as requested, the trial court gave the jury a cautionary instruction on the matter.

Therefore, the trial court did not abuse its discretion by denying defendant Moore's motion for a mistrial.

C. Prosecutorial Misconduct

Next, defendant Moore claims that she is entitled to a new trial because the prosecutor vouched for the complainant's brother and appealed to the jurors' civic duty. We disagree.

Generally, this Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). But because defendant Moore failed to object to the prosecutor's conduct below, we review her unpreserved claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Defendant Moore claims that the prosecutor vouched for the complainant's brother when he stated, "You had [the complainant's] brother come here and testify who also testified truthfully as he could remember it." A prosecutor may not vouch for the credibility of a witness by conveying that he has some special knowledge that the witness is testifying truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001).

Defendant Moore has not demonstrated plain error affecting her substantial rights. Viewed in context, the prosecutor did not convey to the jury that he had special knowledge that the witness was testifying truthfully, and the challenged remarks were plainly focused on refuting defense counsel's suggestion made during trial that the prosecution witnesses, including the complainant's brother, were not credible. Before making the challenged remarks, the prosecutor told the jurors to "use their common sense," and noted that if the complainant's brother intended to lie, he would not have testified that a man with a gun was also at the friend's house. Otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989). Furthermore, a prosecutor may appeal to common sense when arguing that the circumstances of certain testimony make the testimony believable. See, e.g., *People v Fisher*, 220 Mich App 133, 160; 559 NW2d 318 (1996).

To the extent the prosecutor's remarks could be considered improper, they involved only a brief portion of his closing argument, and were not so inflammatory that defendant Moore was prejudiced. Any prejudice that may have resulted could have been cured by a timely instruction. *Schutte, supra* at 721. Indeed, the trial court instructed the jurors that they were the sole judges of the witnesses' credibility, and that the lawyers' comments are not evidence. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, this claim does not warrant reversal.

Defendant Moore also claims that the prosecutor appealed to the jurors' civic duty when he stated:

You know, Albert Einstein once said, the world is a dangerous place, not because of those in it can do evil, but because of those who stand by and let it happen

Prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jurors, or arguments that appeal to the jury to sympathize with the victim. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). Here, the prosecutor's comments, which were made during rebuttal argument, occurred after a lengthy discussion of the evidence, were isolated, and were not so inflammatory that defendant Moore was prejudiced. See *People v Mayhew*, 236 Mich App 112, 122-123; 600 NW2d 370 (1999). Moreover, the trial court's instructions that the jury should not be influenced by sympathy or prejudice, that the lawyers' comments are not evidence, and that the case should be decided on the basis of the evidence were sufficient to dispel any possible prejudice. *Long, supra*. Defendant Moore is not entitled to a new trial.

D. Effective Assistance of Counsel

Defendant Moore also argues that defense counsel was ineffective for failing to call an eyewitness identification expert or request an instruction regarding the unreliability of eyewitness identification, and for failing to object to the prosecutor's alleged misconduct discussed in part II(C). We disagree.

Because defendant Moore failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant Moore avers that defense counsel should have called an identification expert to attack the complainant's and Carter's identifications, because identity was a critical issue at trial. A trial counsel's decisions concerning what witnesses to call and what evidence to present are matters of trial strategy. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call [the] witnesses deprived [her] of a substantial defense that would have affected the outcome of the proceeding." *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant Moore has failed to overcome the presumption that defense counsel's inaction was trial strategy. The complainant testified that she was "positive" that defendant Moore physically attacked her, and was the driver of the car. The complainant and Carter picked defendant Moore out of a lineup. Additionally, another witness at the scene positively identified defendant Moore as being involved in the altercation with the complainant. Furthermore, during the altercation, the complainant was very close to defendant Moore and, presumably, had a good opportunity to view her. In light of these facts, defense counsel could have reasonably surmised that calling an identification expert would have been futile, or that an expert may have actually been harmful to the defense. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Rockey, supra* at 76-77.

Furthermore, even if counsel's failure to retain an identification expert could be deemed unreasonable, defendant Moore cannot establish prejudice. At the conclusion of the trial, the court included in its instructions CJI2d 3.6 (witness credibility) and CJI2d 7.8 (identification), which apprised the jury of the proper considerations in determining whether to accept or reject eyewitness identifications. Additionally, these instructions accomplished the same goal as an eyewitness identification instruction would have, which is to caution the jury about the unreliability of the testimony. As a matter of trial strategy, defense counsel may not have requested an eyewitness identification instruction to avoid redundancy.

Also, defense counsel adequately presented his attack on the witnesses' identifications through cross-examination, and closing argument. For example, defense counsel brought out the traumatic and transitory conditions under which the complainant and Carter saw the perpetrators, inconsistencies in their testimony, and their alcohol and drug use on the night of the offense. Accordingly, defendant Moore cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. *Effinger, supra*.

We also reject defendant Moore's claim that defense counsel was ineffective for failing to object to the prosecutor's alleged misconduct. In light of our determination in part II(C) that the allegations of prosecutorial misconduct are without merit, it follows that counsel's failure to object did not deprive defendant Moore of the effective assistance of counsel. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), and *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991) (counsel is not required to make a frivolous objection, or advocate a meritless position). Defendant Moore is not entitled to a new trial on this basis.

III. Defendant Dyer's Issues in Docket No. 252305

A. Admission of Evidence

1. Other Acts

Defendant Dyer claims that her convictions should be reversed because the evidence that the police confiscated ammunition and an empty gun holster from her residence weeks before this offense was inadmissible, under MRE 404(b), as "other acts evidence," and because the prosecutor failed to provide the required notice, as required by MRE 404(b)(2). We disagree.

To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. MRE 103(a)(1); *Griffin, supra* at 44. Although defendant Dyer objected to the evidence, she did so on relevancy grounds only. Thus, any issue concerning MRE 404(b) was not properly preserved. Therefore, we review the issue for plain error affecting defendant Dyer's substantial rights. *Carines, supra*.

MRE 404(b) prohibits "evidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime. MRE 404(b)(1); see also *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). But other acts evidence is admissible under MRE 404(b) if it is offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, is relevant to an issue or fact of consequence at trial, and is sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403. *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In application, the admissibility of evidence under MRE 404(b) necessarily hinges on the relationship of the elements of the charge, the theories of admissibility, and the defenses asserted. *VanderVliet, supra* at 75. Additionally, the prosecution is required to provide notice before trial when it intends to introduce other acts evidence. MRE 404(b)(2).

Because it is not apparent that the challenged evidence could not have been received successfully and correctly under MRE 404(b), defendant Dyer has failed to demonstrate plain error. The record demonstrates that the evidence was not offered to show that defendant Dyer had a bad character. Rather, the evidence was probative of defendant Dyer's identity as the shooter, and assisted the jury in weighing the witnesses' credibility. The prosecution theorized that the evidence that the police confiscated an empty gun holster and ammunition from defendant Dyer's residence demonstrated her accessibility to a gun, particularly since no gun was recovered with the ammunition and holster. Given the prosecution's theories, there were legitimate, material, and contested grounds on which to offer the evidence. Moreover, the evidence was not inadmissible simply because the very nature of the evidence is prejudicial. The danger that MRE 404(b)(1) seeks to avoid is that of *unfair* prejudice, and defendant Dyer has not demonstrated that she was unfairly prejudiced. See *Starr, supra* at 499. Therefore, defendant Dyer is not entitled to a new trial on the basis of this unpreserved evidentiary issue.

2. Group Photograph

Defendant Dyer also argues that the trial court's admission of a "group photograph" showing her and "some acquaintances" was irrelevant and unduly prejudicial. We disagree.

The decision to admit photographic evidence is within the sole discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Mills, supra* at 76. The proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice. *Id.*

Although the prosecutor wavered on his theory of admission, the photograph was ultimately admitted to corroborate Carter's claim that defendant Dyer wore braids in her hair. Carter initially identified a person other than defendant Dyer from a pretrial lineup and explained that he subsequently changed his mind after he realized that defendant Dyer looked different

because she had removed the braids from her hair. Defense counsel thereafter presented evidence that Carter did not initially describe the shooter as wearing braids. Thereafter, the prosecutor proffered the photograph to show that defendant Dyer previously wore braids. Thus, the photograph was relevant. MRE 401.

Furthermore, defendant Dyer has not demonstrated that the probative value of the photograph was substantially outweighed by its prejudicial effect. MRE 403. A review of the photograph reveals that it is not overly inflammatory, and, contrary to defendant Dyer's claim, does not appear to depict gang activity. The simple fact that a woman in the photograph has her middle finger extended is not dispositive. As noted by the trial court, "just looking at the face of the picture it just looks like this young lady is having a good time and having a picture taken." Moreover, even if the photograph was not admissible, it is highly improbable that the outcome would have been different had the trial court precluded it. *Lukity, supra*. Reversal is not warranted on this basis.

C. Prosecutorial Misconduct

Next, defendant Dyer claims that she is entitled to a new trial because of several instances of prosecutorial misconduct. We disagree.

Because defendant Dyer failed to object to the prosecutor's conduct below, we review her unpreserved claims for plain error affecting substantial rights. *Carines, supra*.

1. Denigration of Defense Counsel

Defendant Dyer claims that the prosecutor made several comments that denigrated defense counsel and her defense. In opening statement, the prosecutor told the jury that "the defense" will try to "distract it" with evidence regarding the complainant's and Carter's drug and alcohol use. In rebuttal argument, the prosecutor referred to the misidentification defense as a "smoke screen" and a "distraction," suggested that defense counsel was attempting to confuse the jury, asked "[w]hy are [they] harassing" the complainant and Carter about drinking and using drugs if the defendants do not contest being present, and stated that "all this business about someone else there being the shooter" is ridiculous, and I trust that you'll find it's ridiculous cause [sic] it's inconsistent [with the evidence]."

A prosecutor may not personally attack the credibility of defense counsel, or suggest that defense counsel is intentionally attempting to mislead the jury. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996); *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). The jury's focus must remain on the evidence, and not be shifted to the attorney's personalities. See *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996).

Although the prosecutor's remark during opening statement bordered on argument, it was not so inflammatory that defendant Dyer was prejudiced. Considering the context of the other remarks, which were made during rebuttal argument, drew no objection, and were made during a vigorous adversarial proceeding, they did not amount to an improper personal attack on defense counsel, or shift the jury's focus from the evidence to defense counsel's personality. Rather, viewed in context, the prosecutor's remarks conveyed his contention that, based on the evidence,

the misidentification defense was a pretense and unreasonable. A prosecutor is free to argue reasonable inferences arising from the evidence as they relate to his theory of the case, and is not required to phrase arguments and inferences in the blandest possible terms. *Fisher, supra* at 156; *Ullah, supra* at 678. Furthermore, the trial court's instructions that the jurors were the sole judges of the witnesses' credibility and that the lawyers' comments are not evidence were sufficient to dispel any perceived prejudice. *Long, supra*. Accordingly, this claim does not warrant reversal.¹

2. Facts Not in Evidence

We reject defendant Dyer's claim that the prosecutor denied her a fair trial by arguing facts not in evidence. A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994).

Defendant Dyer argues that the prosecutor argued facts not in evidence when he stated that Carter saw her "arm go up," although his actual testimony was that he saw her arm extended. But it appears that the prosecutor simply used different words in describing Carter's testimony. Furthermore, any prejudice that may have resulted could have been cured by a timely instruction. *Schutte, supra* at 721. In fact, the trial court's instructions that the lawyers' comments are not evidence and that the case should be decided on the basis of the evidence were sufficient to dispel any perceived prejudice. *Long, supra*. Accordingly, this claim does not warrant reversal.

Defendant Dyer also claims that the prosecutor argued facts not in evidence when he stated that "remnants" of a gun were found in her residence:

What other evidence have you been presented with? You've been presented with the fact that there was a search warrant that was conducted on Defendant Dyer's residence and we know that there was a holster there and there were various kinds of ammunition. There wasn't a gun recovered at that time, but we know that *there were remnants of a gun* that was recovered (emphasis added).

Viewed in context, the term "remnants" was used in reference to the ammunition and holster. Immediately after the comments, the prosecutor again referred to the ammunition. Additionally, during the direct examination of a police officer, the following exchange occurred:

Q. What kind of ammunition was found?

A. Four live 9 millimeter rounds

Q. Okay. And was [sic] there any other confiscations of *remnants* of a weapon?

A. Yes, there was.

¹ We note that the record shows instances where defense counsel used similar language, such as when he stated that the prosecutor presented a "red herring."

Q. What was it?

A. There was a black holster, black leather holder (emphasis added).

Additionally, to the extent that the remarks could be considered improper, the trial court's instructions were sufficient to dispel any perceived prejudice. *Id.* Accordingly, this claim does not warrant reversal.

Defendant Dyer also contends that the prosecutor argued facts not in evidence by noting that the jury saw the complainant's incision, which the prosecutor stated she needed "to save her life," even though there was no medical or expert testimony that the complainant's life was threatened. During trial, there was evidence that the complainant was shot with a firearm. The complainant testified regarding the injuries she suffered, and showed the jury her incision. Because it was a reasonable inference from the evidence that the complainant required the medical treatment to "save her life," the prosecutor's comments were not improper. *Fisher, supra.* Defendant Dyer is not entitled to a new trial.

3. Vouching

Defendant Dyer also argues that the prosecutor improperly vouched for the complainant's brother when he stated, "You had [the complainant's] brother come here and testify who also testified truthfully as he could remember it," and for Carter when he stated that he "was sworn to tell the truth, the whole truth and nothing but the truth as he saw it."

Defendant Dyer has not demonstrated a plain error affecting her substantial rights. Viewed in context, the prosecutor did not convey to the jury that he had special knowledge that the witnesses were testifying truthfully, and the challenged remarks were plainly focused on refuting defense counsel's suggestion made during trial that the prosecution witnesses were not credible. *Duncan, supra; Simon, supra.* In addition to the challenged comments, the prosecutor explained that the jury could infer that the witnesses were credible based on the evidence, and cited the evidence and inferences therefrom to establish their credibility. *Fisher, supra.* To the extent the prosecutor's remarks could be considered improper, the trial court's instructions that the jurors were the sole judges of the witnesses' credibility, and that the lawyers' comments are not evidence were sufficient to dispel any possible prejudice. *Long, supra.* Accordingly, this claim does not warrant reversal.

D. Effective Assistance of Counsel

Next, defendant Dyer raises several claims of ineffective assistance of counsel. Because defendant Dyer failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *Ginther, supra; Sabin (On Second Remand), supra.*²

² This Court denied defendant's motion to remand for an evidentiary hearing.

1. Jury Voir Dire

Defendant Dyer argues that defense counsel was ineffective for failing to object to statements made by the trial court during jury voir dire that impermissibly “relaxed” the reasonable doubt standard.

During voir dire, the trial court attempted to explain the concept of reasonable doubt. After asking the prospective jurors if any had served as a juror, the court explained the difference between a civil case and a criminal case. In doing so, the court made the following comments:

To quantify that, a civil case, the side with fifty-one percent of the evidence in their favor would win versus the side that only had forty-nine percent of the evidence in their favor. Now, again, here today is a criminal case and in a criminal case, in this case, [the prosecutor] on behalf of the People of the State of Michigan must prove each element of the charge beyond a reasonable doubt.

We don't know exactly how much that is. We can't exactly quantify that, but we do know it is substantially more than fifty-one percent (emphasis added).

Even if a reasonable attorney would have objected, defendant Dyer cannot establish prejudice. Considered in context, it is apparent that the court was attempting to gauge an understanding of the prospective jurors' abilities to understand and apply the law, i.e., the prosecution's burden of proof in a criminal case. Furthermore, immediately following the challenged comments, the following occurred:

Trial Court: Do you understand that [the prosecutor] must prove each element of the charge to you beyond a reasonable doubt before you can return with a conviction on any one of these three charges? Do you understand that?

Jurors: Yes.

Trial Court: Reasonable doubt. I'm now going to read you the definition of reasonable doubt. A reasonable doubt is a fair, honest doubt, growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that, a doubt that is reasonable after a careful and considered examination of the facts and circumstances of this case.

Again, a reasonable doubt is a fair, honest doubt, growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that, a doubt that is reasonable after a careful and considered examination of the facts and circumstances of this case.

Again, [the prosecutor] must prove each element of the charge to you beyond a reasonable doubt before you can return with a conviction on any one of these three counts, these three charges.

Additionally, in its final instructions, the court instructed the jury as follows:

If you find that the prosecutor has not proven every element beyond a reasonable doubt, then you must find the Defendant not guilty. A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense.

A reasonable doubt is just that, a doubt that is reasonable after a careful and considered examination of the facts and circumstances of this case.

Defendant Dyer does not challenge the reasonable doubt instruction, which was consistent with CJI2d 1.9, as being deficient in any way. The instruction, which the trial court gave three times, alleviated any possible confusion arising from the brief statements made during voir dire. Accordingly, defendant Dyer cannot demonstrate that there is a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. *Effinger, supra*. Defendant Dyer is not entitled to a new trial on this basis.³

2. Scoring of Offense Variables 3 and 6

Defendant Dyer argues that defense counsel was ineffective for failing to object to the scoring of offense variable (OV) 3, and for acquiescing to the score of fifty points for OV 6. We disagree.

Contrary to defendant Dyer's claim, defense counsel did object to the scoring of OV 3. Indeed, in relation to a different issue in her brief, defendant Dyer acknowledges that "[a]n objection was made to the scoring of OV 3." Therefore, this claim is without merit.

Furthermore, even though defense counsel did not challenge the scoring of OV 6, defendant Dyer cannot demonstrate that counsel was ineffective. MCL 777.36(1)(a) provides that fifty points may be scored where "[t]he offender had a premeditated intent to kill." Although defendant Dyer correctly observes that a sentencing judge should score this variable consistent with a jury verdict unless the judge has information that was not presented to the jury, MCL 777.36(2)(a), the jury here was not required to determine premeditation. Thus, we reject defendant Dyer's claim that a score based on a finding of premeditation is inconsistent with the jury's verdict.

Additionally, the evidence indicated that, after a physical altercation with the complainant, the defendants got into their car in pursuit of the complainant's car, and nearly ran it off the road. During the pursuit, defendant Dyer leaned "halfway" out the window, extended her arm, and shot the complainant. This evidence was sufficient to support the trial court's score of fifty points for OV 6; therefore, any objection would have been futile. Counsel is not required to make a frivolous objection. See *Snider, supra*, and *Gist, supra*. Accordingly, defendant Dyer

³ In a separate issue, defendant Dyer argues that the trial court's statements denied her a fair trial. For the reasons discussed, defendant Dyer is not entitled to relief on that basis.

cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. *Effinger, supra*. Defendant Dyer is not entitled to a new trial on this basis.

3. Failure to Call Witnesses

We also reject defendant Dyer's claim that defense counsel was ineffective for failing to call her, her mother, and her grandmother to testify that the ammunition and gun holster found in her residence belonged to her estranged husband. As previously indicated, a trial counsel's decisions concerning what witnesses to call and what evidence to present are matters of trial strategy. *Rockey, supra* at 76.

Defendant Dyer has failed to demonstrate that the proffered testimony was valuable to her defense or would have affected the outcome of the trial. Evidence concerning whether defendant Dyer actually owned the ammunition, gun holster, or the missing firearm would have been of little significance in this case, because the focus was her accessibility to a firearm. As such, defense counsel could have chosen not to call the witnesses because their testimony would have been inconsequential. Additionally, at trial, the police officer who testified regarding the confiscated gun holster and ammunition also testified that male clothing was found in the lower residence where defendant Dyer's mother and grandmother lived. He further testified that, although no male clothing was found in defendant Dyer's upstairs residence, it "appeared that there was a male staying there." As such, there was evidence from which the jury could infer that the missing gun belonged to the "male staying there." In sum, defendant Dyer has failed to overcome the presumption that defense counsel, as a matter of trial strategy, reasonably refrained from presenting this seemingly insignificant testimony. *Effinger, supra*. Defendant Dyer is not entitled to a new trial on this basis.

4. Redaction of Codefendant Moore's Out-of-Court Statement

Defendant Dyer next argues that defense counsel was ineffective for failing to request redaction of codefendant Moore's statement to eliminate any mention of her. We disagree.

In a statement made to the police, codefendant Moore maintained that, at the time of the shooting, she was at home with her mother and daughter and believed that defendant Dyer was also at her home. Codefendant Moore denied being involved in a fight on February 11, 2003, and denied that she saw defendant Dyer at any time on that day. She stated that she did not know why witnesses identified her or codefendant Dyer as being involved in a fight on that day.

The only reference to defendant Dyer is that codefendant Moore did not see her on the day of the incident. Contrary to defendant Dyer's suggestion, codefendant Moore's statement did not implicate her, and there is nothing to support defendant Dyer's claim that the jury inferred that the defendants "got together and made up this alibi." Furthermore, even if a reasonable attorney would have requested redaction, there is no reasonable probability that the result of the proceedings would have been different in the absence of the alleged error. *Effinger, supra*. Therefore, reversal is not warranted on this basis.

5. Suppression of Carter's In-Court Identification

Defendant Dyer argues that defense counsel was ineffective for failing to move to suppress Carter's in-court identification because it was tainted by an impermissibly suggestive identification procedure, and for failing to introduce the fact that Carter incorrectly identified one of the lineup participants as having been in the backseat of codefendant Moore's car.

At a lineup, Carter initially identified an individual other than defendant Dyer. After the lineup concluded and the lineup attorney left, Carter told an officer that he had changed his mind, and then identified defendant Dyer from photographs of the original lineup. Defendant Dyer suggests that Carter changed his identification because he was in visual contact with and within thirty to forty feet of the complainant and her brother, both of whom identified defendant Dyer, and who may have prompted Carter. Defendant Dyer also suggests that the lineup procedure was suggestive because it included both her and codefendant Moore, who do not look sufficiently similar.

Defendant Dyer cannot establish impairment of her right to the effective assistance of counsel. Although identification procedures that are unnecessarily suggestive and conducive to irreparable misidentification deny a defendant due process, *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001), the record contains no indication that any impermissible or unduly suggestive identification procedures occurred here. First, defendant Dyer has failed to provide any authority for her proposition that, in this case, it was impermissible or unduly suggestive for both she and codefendant Moore to be in the same pretrial lineup. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *Griffin, supra* at 45.

Additionally, defendant Dyer offers only speculation that Carter's change of mind was prompted by signals from the complainant and her brother. At trial, Carter explained the circumstances regarding his change of mind, i.e., a change in defendant Dyer's hairstyle. Furthermore, the fact that Carter changed his mind, and that he did so after the lineup concluded and the lawyer left were presented to the jury. Given the circumstances regarding Carter's pretrial identification of defendant Dyer, defense counsel could have reasonably decided to bring forth those circumstances, as opposed to moving to suppress the identification. Indeed, defense counsel attacked the inconsistencies in Carter's testimony through cross-examination and closing argument, and highlighted his failure to initially select defendant Dyer from the lineup. Defendant has not overcome the presumption that defense counsel's decision was a matter of strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *Rockey, supra* at 76-77.

Moreover, even if a reasonable attorney would have moved to suppress the identification, defendant Dyer cannot establish prejudice, because the record establishes that there was an independent basis to admit Carter's in-court identification of defendant Dyer. See *People v Kachar*, 400 Mich 78, 95-97; 252 NW2d 807 (1977); *People v Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000).⁴ Although Carter testified that he did not know defendant Dyer

⁴ In determining whether an independent basis exist, the factors to be considered include: (1) the
(continued...)

before the shooting, the record established that he had an ample opportunity to observe her before and during the offense. Carter testified that he was seated in his car when defendants pulled up beside him, and he observed defendant Dyer exit the car. Carter indicated that he was “positive” that the person was defendant Dyer. He also saw defendant Dyer leaning “halfway” out the car window as he was being chased. In sum, because there was an independent basis to admit Carter’s in-court identification of defendant Dyer, any objection would have been futile. Counsel is not required to advocate a meritless position. See *Snider, supra*, and *Gist, supra*.

We also reject defendant Dyer’s claim that defense counsel was ineffective for failing to introduce the fact that Carter incorrectly identified one of the lineup participants as being in the backseat of codefendant Moore’s car. Defendant Dyer has failed to demonstrate that the proffered evidence was valuable to her defense or would have affected the outcome of the trial. Furthermore, defense counsel could have chosen not to present the evidence for various reasons, including that it was inconsequential. Defense counsel’s evidentiary decisions fall within the purview of trial strategy, which we will not second-guess on appeal. *Rockey, supra*. In sum, defendant Dyer cannot demonstrate that there is a reasonable probability that, but for counsel’s inaction, the result of the proceeding would have been different. *Effinger, supra*. Defendant Dyer is not entitled to a new trial on this basis.

6. Prosecutorial Misconduct

We reject defendant Dyer’s claim that defense counsel was ineffective for failing to object to the prosecutor’s alleged misconduct. In light of our determination in part III(C) that the allegations of prosecutorial misconduct are without merit, it follows that counsel’s failure to object did not deprive defendant Dyer of the effective assistance of counsel. *Effinger, supra*. Accordingly, defendant Moore is not entitled to a new trial on this basis.

E. Sentence

We also reject defendant Dyer’s claim that she is entitled to resentencing because the trial court improperly scored OV 3.⁵ Defendant Dyer’s challenge to the scoring of OV 3 was raised below and, therefore, is properly preserved. “A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision “for which there is any evidence in support will be upheld.” *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

(...continued)

witness’ prior knowledge of the defendant; (2) the witness’ opportunity to observe the criminal during the crime; (3) the length of time between the crime and the disputed identification; (4) the witness’ level of certainty at the prior identification; (5) discrepancies between the pretrial identification description and the defendant’s actual appearance; (6) any prior proper identification of the defendant or failure to identify the defendant; (7) any prior identification of another as the culprit; (8) the mental state of the witness at the time of the crime; and (9) any special features of the defendant. *Id.*

⁵ Defendant Dyer’s also challenges the scoring of OV 6, which was addressed in part D.

Defendant Dyer was scored twenty-five points for OV 3. MCL 777.33(1)(c) provides that twenty-five points are to be scored if “[l]ife threatening or permanent incapacitating injury occurred to a victim.” Defendant Dyer argues that there was no evidence that the victim suffered any life-threatening injury. The trial court found that, based on the complainant’s testimony and its “actual observations of the injuries to the complainant,” there was a life-threatening injury. At trial, the victim testified that, as a result of the shooting, she suffered a gunshot wound to her left hip area, which entered through her back and punctured her stomach, “bowels and an artery vein.” The victim was in surgery for three hours, received thirty-two staples in her stomach, and remained in the hospital for two weeks. This evidence was sufficient to support the trial court’s score of twenty-five points for OV 3. Accordingly, defendant Dyer is not entitled to relief on this basis.

In addition, defendant Dyer argues that trial court erred when it sentenced her based on facts not supported by the jury verdict in contravention of the United States Supreme Court’s recent decisions in *Blakely v Washington*, 542 US ____; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *US v Booker*, 543 US ____; 125 S Ct 738; ____ L Ed 2d ____ (2005). However, in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), our Supreme Court addressed the impact of *Blakely* on our sentencing system. The Court noted that the sentencing system addressed in *Blakely* was a determinate sentencing system as opposed to Michigan’s indeterminate sentencing system and that the holding in *Blakely* was designed to protect defendants from higher sentences based on facts not found by a jury. *Id.* The Court then reasoned that, because the maximum sentence under Michigan’s sentencing system is set by law and the trial judge cannot exceed it, the holding in *Blakely* did not affect our system. *Id.* Like the system in *Blakely*, and unlike Michigan’s sentencing system, *Booker* dealt with a determinate sentencing system and the constitutionality of a departure in excess of the maximum sentence permitted by the statute based on facts not found by the jury. *Booker, supra.* Therefore, we do not believe that *Booker* alters the applicability of *Claypool*. Consequently, the trial court did not err when it considered facts not necessarily found by the jury in rendering its verdict.

F. Sufficiency of the Evidence

Defendant Dyer’s final argument is that the evidence was insufficient to support her conviction of assault with intent to commit murder because there was no evidence of intent. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact’s role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514. Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

To sustain a conviction for assault with intent to commit murder, the prosecution must establish beyond a reasonable doubt that the defendant committed “(1) an assault, (2) with an

actual intent to kill, (3) which, if successful, would make the killing murder.” *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); see also MCL 750.83. Defendant Dyer challenges only the intent element.

The intent to kill may be inferred from facts in evidence, including the use of a dangerous weapon; because an actor’s state of mind is difficult to prove, only minimal circumstantial evidence is required. See *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999), and *People v Ray*, 56 Mich App 610, 615; 224 NW2d 735 (1974). Evidence was presented that, following a confrontation on the street, the complainant fled in Carter’s car, the defendants pursued her for five minutes, and defendant Dyer eventually leaned out of her car window and fired a handgun at Carter’s vehicle. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to infer that defendant Dyer assaulted the complainant with an actual intent to kill.

Although defendant Dyer asserts that the witnesses were not credible, the jury was entitled to accept or reject any of the evidence presented. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999), and *People v Marji*, 180 Mich App 525, 542; 447 NW2d 835 (1989). Moreover, a prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). In sum, viewed in a light most favorable to the prosecution, the evidence was sufficient to sustain defendant Dyer’s conviction of assault with intent to commit murder.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski